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 8 Attorneys for Defendants and Counterclaimants  
 KB HOME SOUTH BAY INC., KAUFMAN AND  
 BROAD-MONTEREY BAY, INC., and K & B  
 9 BAKEWELL SEASIDE VENTURE, LLC

10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

12 TRAVELERS PROPERTY CASUALTY  
 COMPANY OF AMERICA, a Connecticut  
 13 corporation,

14 Plaintiff,

15 vs.

16 KAUFMAN & BROAD MONTEREY  
 BAY, INC., a California corporation, K&B  
 17 BAKEWELL SEASIDE VENTURE, LLC,  
 a California Limited Liability Company,  
 18 and KB HOME SOUTH BAY, INC., a  
 California Corporation and DOES 1  
 19 through 10, inclusive,

20 Defendants.

21 AND RELATED COUNTERCLAIM.  
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CASE NO.: CV 13-04745 EJD (PSGx)

**MOTION FOR LEAVE TO SEEK  
 CLARIFICATION REGARDING THE  
 COURT'S RULING AT PRETRIAL  
 CONFERENCES WITH RESPECT TO  
 COUNTERCLAIMANTS' CLAIM FOR  
 BREACH OF THE IMPLIED COVENANT  
 OF GOOD FAITH AND FAIR DEALING**

**CIV. L.R. 7-9**

FILE DATE: October 11, 2013  
 TRIAL DATE SET: June 10, 2015

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

PLEASE TAKE NOTICE that defendants/counter-claimants KB Home South Bay Inc., Kaufman & Broad-Monterey Bay, Inc., and K&B Bakewell Seaside Venture, LLC (collectively “KB”) respectfully request that the Court grant KB leave to seek clarification of the Court’s ruling with respect to KB’s claim for breach of the implied covenant of good faith and fair dealing.

A pretrial conference took place on May 21, 2015. Following the pretrial conference and receipt of briefing by the parties (Dkt. 130, 163, 163-1, 200, 200-1, 202, 213), the Court GRANTED Plaintiffs’ ninth motion in limine to exclude Defendants’ Brandt fee claims, stating “[a]t summary judgment, this court found that Plaintiff provided an immediate and complete defense when it settled the Davis action. Since there is no indication that Plaintiff withheld coverage or any other policy benefit, there is no basis for Brandt fees.” Dkt. 216. A further pretrial conference took place on May 26, 2015 during which the parties and the Court discussed the Court’s grounds for its ruling.

In order to aid the parties in the mediation on June 8, 2015 and in deciding whether to request a court trial or a jury trial, KB respectfully requests leave to seek the Court’s clarification regarding its ruling.

It is still unclear to KB whether the Court, in addition to barring KB’s claim for Brandt fees, has also ruled that KB cannot recover any other types of damages under its breach of implied covenant of good faith and fair dealing cause of action. Croskey, Heeseman, Imre & Ehrlich, CAL. PRAC. GUIDE: INSURANCE LITIGATION (The Rutter Group 2014) §13:72.5 (an injured party who fulfills its obligation to mitigate damages may recover the reasonable costs of doing so); *Howard v. Am. Nat’l Fire Ins. Co.*, 187 Cal. App. 4th 498, 532-33, 535-39 (2010) (attorneys’ fees and prejudgment interest are properly awarded as costs of mitigation); *Lincoln Prop. Co., N.C., Inc. v. Travelers Indemnity Co.*, 137 Cal. App. 4th 905, 915 (2006) (damages for breach of the duty to defend and breach of the implied covenant of good faith and fair dealing arise from breach of the same contract). Further, if the Court has barred KB from recovering any other types of damages, has the Court effectively granted partial summary judgment in Travelers’

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favor on KB’s claim for breach of the implied covenant of good faith and fair dealing?

Dated: June 2, 2015

NEWMAYER & DILLION LLP

By: /s/ C. Kendie Schlecht  
John A. O’Hara  
Michael J. Studenka  
C. Kendie Schlecht  
Attorneys for Defendants and  
Counterclaimants KB HOME SOUTH  
BAY INC., KAUFMAN AND BROAD-  
MONTEREY BAY, INC., and K & B  
BAKEWELL SEASIDE VENTURE, LLC

**CERTIFICATE OF SERVICE**

*Travelers Prop. Cas. Co. of America v. Kaufman & Broad Monterey Bay, Inc., et al.*  
USDC Northern District Case No. CV 13-04745 EJD (PSGx)

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF ORANGE )

I, Dee Novoa, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 895 Dove Street, 5th Floor, Newport Beach, California 92660. On June 2, 2015, I served a copy of the within document(s):

**MOTION FOR LEAVE TO SEEK CLARIFICATION REGARDING THE COURT'S RULING AT PRETRIAL CONFERENCES WITH RESPECT TO COUNTERCLAIMANTS' CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

- ☒ (BY CM/ECF SYSTEM – VIA NOTICE OF ELECTRONIC FILING (“NEF”)  
I certify that on the date referenced above, I electronically transmitted the document(s) listed for submission to the United States District Court Northern District, using the ECF System required for filing and transmission of Electronic Notices to the ECF registrants/recipients registered with the United States District Court Northern District at the e-mail address(es) set forth below.
- ☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Newport Beach, California addressed as set forth below.
- ☐ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 2, 2015, at Newport Beach, California.

/s/ Dee Novoa

Dee Novoa